

83-2131

No.

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# In the Supreme Court of the United States

October Term, 1983

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THE CITY OF OVERLAND PARK, KANSAS, THE  
CITY OF KANSAS CITY, KANSAS, NORMAN  
JUSTICE, and W. BOZARTH,  
*Petitioners,*

vs.

KENNETH W. HAMILTON,  
*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## **QUESTIONS PRESENTED**

1. When a claim based on facts which would only support a wrongful arrest claim under state law is brought under 42 U.S.C. § 1983, is a federal appeals court free to disregard a state Supreme Court decision that the most analogous state statute of limitations to apply to such a 42 U.S.C. § 1983 claim is the state statute of limitations for wrongful arrest?

2. Was the federal appeals court correct in deciding that a general personal injury state statute of limitations should be applied to all 42 U.S.C. § 1983 claims regardless of the factual allegations?

## **PARTIES TO THE PROCEEDING**

The parties to the proceeding in the court of appeals were Kenneth W. Hamilton, as appellant, and the City of Overland Park, Kansas, the City of Kansas City, Kansas, and Kansas City, Kansas, employees Norman Justice and William Bozarth, as appellees.



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No.

**In the Supreme Court of the United States**

**October Term, 1983**

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THE CITY OF OVERLAND PARK, KANSAS, THE  
CITY OF KANSAS CITY, KANSAS, NORMAN  
JUSTICE, and W. BOZARTH,  
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**PETITION FOR A WRIT OF CERTIORARI TO THE  
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The City of Overland Park, Kansas, et al., pray that a writ of certiorari issue to review the judgment entered in this case on March 30, 1984, by the United States Court of Appeals for the Tenth Circuit, that a two-year statute of limitations is the most appropriate limitations period for respondent's 42 U.S.C. § 1983 claim.

### **OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Tenth Circuit in *Hamilton v. City of Overland Park, Kan.*, is reported at 730 F. 2d 613 (10th Cir. 1984). The opinion of the United States Court of Appeals for the Tenth Circuit upon which the *Hamilton* opinion relies, *Garcia v. Wilson*, is reported at 731 F. 2d 640 (10th Cir. 1984). The opinion and order of the District Court for the District of Kansas is not reported; it is set forth in the Appendix A to this Petition

### **JURISDICTION**

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on March 30, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **STATUTES**

42 U.S.C. § 1983

42 U.S.C. § 1988

Kansas Statutes Annotated:

K.S.A. 60-513(4)

K.S.A. 60-514(2)

These provisions are set forth in Appendix B.



## STATEMENT OF THE CASE

Since this case was decided in the district court on a motion to dismiss filed by the defendant cities in response to the plaintiff Kenneth W. Hamilton's Complaint, the "facts" of the case, which were accepted as true by the district court for purposes of the motion and which must be accepted as true for purposes of this appeal, consist solely of the allegations contained in the Complaint. The relevant "facts" alleged in the Complaint are as follows:

The governmental petitioners/defendants are the City of Overland Park, Kansas, and the City of Kansas City, Kansas, both municipal corporations. The individual petitioners/defendants, Norman Justice and William Bozarth, are employees of the defendant City of Kansas City, Kansas.

On August 27, 1981, Bozarth filed a "misdemeanor summons and complaint ticket" against the respondent/plaintiff Kenneth W. Hamilton in the Municipal Court of Kansas City, Kansas; a copy of the ticket was mailed to Hamilton at an old address, resulting in Hamilton's failure to receive the same. When Hamilton did not respond to the ticket, the Municipal Court of Kansas City, Kansas, issued a bench warrant for Hamilton's arrest on September 11, 1981. On October 12, 1981, Justice and an unnamed police officer of the defendant City of Overland Park, Kansas, arrested Hamilton at his Overland Park residence and took him to jail. Hamilton filed his Complaint in the United States District Court for the District of Kansas on November 3, 1982. In Count I of the Complaint, Hamilton alleges a denial of his constitutionally protected rights of liberty and due process of law constituting a violation of 42 U.S.C. § 1983, due to

“... wrongful arrest under Color of Law by all named defendants.” In Count II, Hamilton alleges pendent state claims, that the wrongful arrest constituted intentional infliction of emotional distress and outrageous conduct.

On April 15, 1983, the United States District Court for the District of Kansas issued an order dismissing Hamilton's Complaint on the basis of his failure to file the Complaint within the time constraints of the most analogous state statute of limitations. *Hamilton v. City of Overland Park*, No. 82-2370 (D. Kan., filed April 15, 1983). Appendix A. The court found this to be the one-year statute of limitations provided in Kansas law, K.S.A. 60-514(2), which provides a statute of limitations for false imprisonment, among other specified torts. In so determining that this was the most analogous state statute of limitations, the court noted that “plaintiff's § 1983 civil rights claim is based solely on facts which under state law would arise to a claim for false imprisonment.” The Court followed the decision of the Kansas Supreme Court, the state court of last resort, in *Miller v. City of Overland Park*, 231 Kan. 557, 646 P. 2d 1114 (1982), that under these circumstances the one-year statute of limitations is the most analogous and the correct statute of limitations to be applied. The court found that the civil rights claim of the Complainant should have been filed by October 12, 1982, dismissed this claim, and accordingly dismissed the pendent state claim for lack of jurisdiction.

Hamilton then appealed this decision to the Tenth Circuit Court of Appeals. He did not appeal the district court finding that his civil rights action was based upon facts which would support under state law only an action for false imprisonment, nor did he appeal the finding that a one-year statute of limitations was the most anal-

ogous statute of limitations for such a civil rights claim. Rather, he appealed the application of the *Miller* rule to his case, saying it was a retroactive application. The appellees responded that *Miller* had been decided four months before the one-year statute of limitations ran on Hamilton's claim, and five months before he filed his Complaint, so there was no retroactive application. The appellate court did not rule upon this issue. The appellate court consolidated cases from the various district courts in the circuit, including this case, all of which involved the issue of the appropriate state statute of limitations for a civil rights claim under the particular facts alleged, and heard these cases *en banc*. Opinions in these cases were issued March 30, 1984.<sup>1</sup>

The Tenth Circuit Court of Appeals issued the heart of its decision on this issue in the case of *Garcia v. Wilson*, 731 F. 2d 640 (10th Cir. 1984), from which a Petition for Writ of Certiorari has also been filed. The *Garcia* decision was applied to the other cases heard *en banc*, including this case. In *Garcia* the Tenth Circuit established a method for selecting a statute of limitations for civil rights actions. The court rejected its past practice of characterizing the 42 U.S.C. § 1983 claim according to its underlying facts, and decided instead to characterize all section 1983 claims as claims for injury to personal rights. The court stated that henceforth all section 1983 claims in the circuit will be uniformly so characterized for statute of limitations purposes.

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1. *Abbitt v. Franklin*, 731 F. 2d 661 (10th Cir. 1984); *Pike v. City of Mission, Kan.*, 731 F. 2d 655 (10th Cir. 1984); *Jackson v. City of Bloomfield*, 731 F. 2d 652 (10th Cir. 1984); *Garcia v. Wilson*, 731 F. 2d 640 (10th Cir. 1984); *Cowdrey v. City of Eastborough, Kan.*, 730 F. 2d 1376 (10th Cir. 1984); *McKay v. Hammock*, 730 F. 2d 1367 (10th Cir. 1984); *Mismash v. Murray City*, 730 F. 2d 1366 (10th Cir. 1984); *Hamilton v. City of Overland Park, Kan.*, 730 F. 2d 613 (10th Cir. 1984).

In *Hamilton v. City of Overland Park, Kan.*, 730 F. 2d 613 (10th Cir. 1984), the Tenth Circuit ruled that the general Kansas two-year statute of limitations for "injury to the rights of another, not otherwise enumerated," K.S.A. 60-513(4), was the appropriate statute to utilize for section 1983 claims. The court therefore stated that because Hamilton had filed his claim within two years after the alleged injury, though more than one year after such injury, the action was timely filed. The court reversed the decision of the district court and remanded the case for further proceedings. The parties have agreed, and the district court has so ordered, that further action in the district court will be stayed pending the outcome of this Petition for Writ of Certiorari.

## **REASONS FOR GRANTING THE WRIT**

### **1. Review By The Supreme Court Is Necessary To Correct A Decision Which Is In Conflict With The Kansas State Court Of Last Resort.**

The problem at the root of all section 1983 statute of limitations disputes is that in enacting the civil rights statutes, Congress did not provide for a statute of limitations. 42 U.S.C. § 1988 admonishes the courts to look to:

the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the constitution and laws of the United States . . .

The United States Supreme Court has repeatedly held that section 1988 instructs the federal courts to refer to state law when federal law provides no rule of decision

for actions brought under the civil rights laws. *Chardon v. Fumero Soto*, ..... U.S. ...., 103 S. Ct. ...., 77 L. Ed. 2d 74 (1983); *Robertson v. Wegmann*, 436 U.S. 584 (1978). Statutes of limitations are among those state statutes to be applied, so long as they are not "inconsistent with the Constitution and laws of the United States." *Board of Regents v. Tomanio*, 446 U.S. 478, 484-85 (1980). The courts must apply the "most appropriate" state statute of limitations, the one most "analogous" to the civil rights claim. *Id.* at 499; *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975). Particularly as it relates to statute of limitations questions, the policy underlying 42 U.S.C. § 1988 has been described as one of "repose and federalism." *Chardon v. Fumero Soto*, *supra*, 77 L. Ed. 2d at 80. In *Chardon*, with respect to the tolling of the statute of limitations, the application by the federal court of rules developed by the state court of last resort to the federal claim was approved by the Supreme Court. There has been no Supreme Court case which specifically directs the federal courts to apply a state court's analysis of the selection of the most analogous state statute of limitations to a federal civil rights claim, but petitioners submit that this direction is implicit in the cases cited above.

The Kansas Supreme Court followed this direction of the United States Supreme Court when it determined that "when a § 1983 civil rights action is based upon facts which would support under state law only an action for . . . false imprisonment, . . . K.S.A. 60-514 is the correct statute of limitations to be applied and that such an action is barred after one year." *Miller v. City of Overland Park, Kansas*, *supra*, 231 Kan. at 562-63, 646 P.2d at 1119. The Kansas Supreme Court described the appropriate interaction between the state and federal courts in

selecting the most analogous statute of limitations for a civil rights claim:

When a state has determined the appropriate statute of limitations for a given set of facts upon which a § 1983 action is based, the federal courts will then apply such determination to similar actions brought in federal court as required by § 1988. The reason for § 1988 is obvious. It would not be in the best interests of justice to have differing statutes of limitations between the state and federal courts for civil rights actions based upon the same set of facts. Under such circumstances, the cause of action might be barred in one court and not in the other, leading to forum shopping and other inconsistencies.

*Id.* at 560, 646 P. 2d at 1117.

Although the district court followed the direction of the United States Supreme Court, relying upon *Miller v. City of Overland Park, Kansas*, to dismiss the action, the Tenth Circuit has chosen to disregard this direction, and in its stead, to adopt a uniform approach to selecting the statute of limitations regardless of any more factually analogous state cause of action which would provide a different statute of limitations.

In the case at bar, based on the facts as contained in the Complaint, Hamilton's civil rights action is based upon facts which would support under state law only an action for false imprisonment. This is a district court finding which was not appealed, nor disturbed by the appellate court, and is therefore the rule of the case.

The issue to the Supreme Court is thus squarely presented, and is of first impression to the Court: are the federal courts bound by determinations of the state courts



as to a selection of the most analogous state statute of limitations in factually similar cases. The Tenth Circuit concluded that it was not so bound. This conflicts with a decision of the Kansas Supreme Court. Court Rules recognize this conflict as a reason to grant certiorari, Sup. Ct. R. 17.1.(a), and petitioner respectfully requests this Court to resolve the conflict and to hold that federal courts are bound by state court determinations respecting the most analogous statute of limitations in civil rights cases.

## **2. Review By The Supreme Court Is Necessary To Correct A Decision Which Is Contrary To The Decisions Of The Court.**

The Tenth Circuit has chosen a "nature of the action" analysis to apply to the selection of the most analogous state statute of limitations in all civil rights actions. The Tenth Circuit had in the past followed the Supreme Court's direction, basing its decision on a critical analysis of the particular allegations of the claim, and then determining if there was a comparable state analogue. *Clulow v. State of Oklahoma*, 700 F. 2d 1291 (10th Cir. 1983); *Shah v. Halliburton Co.*, 627 F. 2d 1055 (10th Cir. 1980); *Zuniga v. AMFAC Foods, Inc.*, 580 F. 2d 380 (10th Cir. 1978). In 1983, however, the Tenth Circuit took a preliminary look at adopting a "nature of action" approach, *Garcia v. University of Kansas*, 702 F. 2d 849 (10th Cir. 1983), and in 1984, in *Garcia v. Wilson*, *supra*, officially adopted this approach for all cases in all districts under its jurisdiction.

The difficulty with the "nature of action" approach is that it totally ignores the possibility that different civil rights actions may have different elements. The Tenth Circuit has accepted the assumption that any time there is an incantation of "civil rights violation" in a Complaint, the action immediately has the nature of an unspecified

injury to personal rights. Contrary to this assumption, many cases which include a civil rights claim are nothing more than basic tort cases with a specific underlying tort. For example, litigants frequently include a civil rights count in a tort complaint so that they may request and perhaps obtain attorneys fees, since attorneys fees are not available in most jurisdictions for tort actions. Litigants may also wish for federal rather than state court jurisdiction. In this connection, another effect of the Tenth Circuit's ruling will be that litigants will also include a civil rights count in a tort complaint so that if they miss a shorter state tort statute of limitations, they may still have a forum for their complaint in federal court.

It would be simplistic to suppose that a motion to dismiss the civil rights claim for failure to state a cause of action would immediately resolve this problem. Unless the claim is deficient on the face of the Complaint, at least some discovery and the presentation of some additional evidence would be necessary to support such a motion, and thus time and money would be expended by both parties before a judge would be in a position to rule that only a tort claim was presented and the shorter statute of limitations should be applied.

Petitioner submits that this uniform "nature of the action" approach is contrary to the decisions of the Court, because it does not recognize that different state statutes of limitation applicable to specific torts may be more analogous to the factual allegations underlying a civil rights claim than a general personal injury statute of limitations.



**3. Review By The Supreme Court Will Resolve Inconsistencies Among The Circuits On This Vital Issue.**

The Tenth Circuit Court of Appeals thoroughly analyzed the holdings of the eleven circuits in its *Garcia* decision, pointing out that each circuit approached the issue at least slightly, and frequently substantially, differently. As previously discussed, the Tenth Circuit then chose to adopt a uniform approach by choosing a "nature of action" analysis. The Tenth Circuit invited the Supreme Court to accept certiorari to resolve the dispute among the circuits. Sup. Ct. R. 17.1.(a). Petitioners urge the Court to accept this invitation. Petitioners also urge the Court to accept certiorari in this case, for the *Hamilton* decision has a feature which is not present in *Garcia*, the issue of the binding effect of state court decisions on federal courts with respect to the selection of the most analogous state statute of limitations. The Court is considering related issues in *Burnett v. Grattan* (No. 83-264, 1983 Term), but the specific issues in *Garcia* and *Hamilton* are not presented therein, so that review of these decisions would not be duplicative. Guidance of the Court is critical on these issues.

## CONCLUSION

In conclusion, petitioners respectfully request that a writ of certiorari issue to the United States Court of Appeals for the Tenth Circuit so that these important issues may be resolved.

Respectfully submitted,

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**APPENDIX A**

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**OPINION AND ORDER, JUDGMENT**

(Filed April 15, 1983)

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

CIVIL ACTION NO. 82-2370

KENNETH W. HAMILTON,  
Plaintiff,

v.

THE CITY OF OVERLAND PARK, KANSAS;  
THE CITY OF KANSAS CITY, KANSAS;  
NORMAN JUSTICE; and W. BOZARTH,  
Defendants.

**MEMORANDUM AND ORDER**

This matter is before the court on defendants' motion to dismiss.

The action arises upon plaintiff's allegation in Count I of his complaint of a denial of his constitutionally protected rights of liberty and due process of law constituting a violation of 42 U.S.C. §1983, due to ". . . wrongful arrest under Color of Law by all named defendants." Complaint, ¶11. Count II, a state claim, alleges the wrongful arrest constituted intentional infliction of emotional distress and outrageous conduct.

The allegations which the court will take as true for the purpose of evaluating this motion to dismiss are: a

misdeemeanor summons and complaint ticket issued against plaintiff in a municipal court of Kansas City, Kansas, by city employee William Bozarth on August 27, 1981; a copy was mailed to plaintiff at 9971 Blue Jacket Street, Overland Park, Kansas; plaintiff no longer resided at that address. On September 11, 1981, a bench warrant was issued against plaintiff, and on October 12, 1981, he was arrested by city employee Norman Justice, an officer with the Overland Park, Police Department. On November 3, 1982, plaintiff filed his complaint against the above named defendants.

Defendants' motion to dismiss contends plaintiff's action is time barred in that the wrongful arrest action brought under 42 U.S.C. §1983, is subject to the one-year statute of limitations found at K.S.A. 60-514(2), which states:

"The following actions shall be brought within one (1) year . . . .

"(2) An action for assault, battery, malicious prosecution, or false imprisonment."

Section 1983, Title 42, United States Code, does not contain a statute of limitations; therefore, federal courts must look to state law to determine the appropriate limitation period. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). Federal courts apply the state period of limitations for the most analogous cause of action consistent with the facts asserted to support the civil rights claim. See *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). In this action, the facts asserted to support the civil rights claim are most analogous to an allegation of false imprisonment, and therefore the action is subject to the one-year statute of limitations of K.S.A. 60-514(2).

In *Miller v. City of Overland Park*, 231 Kan. 557, 646 P.2d 1114 (1982), the Kansas Supreme Court specifically addressed the issue of the appropriate statute of limitations period for allegations of wrongful arrest (false imprisonment) asserted to support a civil rights claim under 42 U.S.C. §1983. In *Miller*, the plaintiff asserted he had been wrongfully arrested by an Overland Park Police Officer on a bench warrant issued from Kansas City, Kansas. Similar to the situation now before the court, *Miller* alleged a cause of action under 42 U.S.C. §1983 and a state tort claim. The Kansas Supreme Court held that the appropriate statute of limitations in wrongful arrest actions brought under 42 U.S.C. §1983 was the one-year limitation of K.S.A. 60-514(2). Specifically, the court stated:

"... it is obvious that plaintiff's complaints all grow out of one simple set of facts which traditionally would support a cause of action for false arrest and imprisonment. K.S.A. 60-514 provides that a one-year statute of limitations shall apply to certain clearly specified actions, to-wit: libel, slander, assault, battery, malicious prosecution, *false imprisonment* and an action, upon a statutory penalty or forfeiture. . . ." *Id.* at 561-62. (Emphasis supplied.)

Clearly, plaintiff's §1983 civil rights claim is based solely on facts which under state law would arise to a claim for false imprisonment, and as such, it is time barred due to the one-year statute of limitations of K.S.A. 60-514, which ran on October 12, 1982. It appears to this court, therefore, that plaintiff can prove no set of facts in support of his claim; hence, defendants' motion to dismiss must be granted.

Plaintiff also seeks to have the court invoke pendent jurisdiction over the state law claims of intentional inflic-

tion of emotional distress and outrageous conduct. In order to exercise jurisdiction over the pendent claims, the court must initially determine that a substantial federal claim was asserted. See *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

Having dismissed plaintiff's civil rights claim alleged under 42 U.S.C. §1983 for failure to state a claim upon which relief can be granted, thereby finding plaintiff's federal claim to be insubstantial, the court lacks jurisdiction to determine the pendent claims alleged in Count II, and therefore must grant defendant's motion to dismiss this count without reaching the merits.

Also before this court is plaintiff's motion for additional time to file a supplemental response. Although this motion was never granted, plaintiff filed a supplemental response on April 8, 1983, to which defendant replied on April 13, 1983. Although plaintiff's supplemental response was not filed with permission of the court, the court has considered the arguments raised, and finds said arguments to be without merit. Plaintiff's motion for additional time to file a supplemental response in light of the circumstances that the response is already on file, will be denied as moot.

IT IS BY THE COURT THEREFORE ORDERED that defendants' motion to dismiss is hereby granted. IT IS FURTHER ORDERED that plaintiff's motion for additional time to file a supplemental response is hereby denied as moot.

DATED: This 15th day of April, 1983, at Kansas City, Kansas.

/s/ Dale E. Saffels

Dale E. Saffels

United States District Judge

(Filed April 18, 1983)

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

Civil Action Docket No. 82-2370

KENNETH W. HAMILTON

vs.

THE CITY OF OVERLAND PARK, KANSAS, THE CITY  
OF KANSAS CITY, KANSAS, NORMAN JUSTICE  
and W. BOZARTH

**JUDGMENT**

This action came on for decision before the court, United States District Judge Dale E. Saffels presiding. The issues having been duly decided and a decision having been duly rendered, it is ordered and adjudged that Plaintiff take nothing and action is dismissed on the merits. Each party to bear its own costs. Plaintiff's motion to file a supplemental response is denied as moot.

Date: April 18, 1983

/s/ Arthur G. Johnson, Clerk

/s/ Molly Riggs

Molly Riggs

Deputy Clerk of the Court

Dated at: Kansas City, Kansas

**APPENDIX B**

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**STATUTES****Title 42, United States Code****§ 1983. Civil action for deprivation of rights.**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

**§ 1988. Proceedings in vindication of civil rights; attorney's fees.**

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses



against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

## KANSAS STATUTES ANNOTATED

### **K.S.A. 60-513. Actions limited to two years.**

(a) The following actions shall be brought within two (2) years:

\* \* \*

(4) An action for injury to the rights of another, not arising on contract, and not herein enumerated.

\* \* \*

### **K.S.A. 60-514. Actions limited to one year.**

The following actions shall be brought within one (1) year.

\* \* \*

(2) An action for assault, battery, malicious prosecution, or false imprisonment.

\* \* \*